

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Glen Posusta and Clint Herbst,

Complainants,
vs.

PROBABLE CAUSE
ORDER

Susie Wojchowski and Fred Patch,

Respondents.

This matter came on for a probable cause hearing under Minnesota Statutes § 211B.34, before Administrative Law Judge Kathleen D. Sheehy on October 30, 2006, to consider a complaint filed by Glen Posusta and Clint Herbst on October 25, 2006. The probable cause hearing was conducted by telephone conference call. The record closed on November 1, 2006, upon receipt of additional exhibits from the Complainants.

Glen Posusta, 2330 Eastwood Cir., Monticello, MN 55362, and Clint Herbst, 9801 Gillard Avenue NE, Monticello, MN 55362 (Complainants) appeared for themselves without counsel.

Susie Wojchowski, 1111 Clubview Drive, Monticello, MN 55362, appeared for herself without counsel.

J. Robert Keena, Esq., Hellmuth & Johnson, PLLC, 10400 Viking Drive, Suite 500, Eden Prairie, MN 55344, appeared for Fred Patch, who also participated in the hearing.

Based on the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge finds that there is probable cause to believe that the Respondents violated Minn. Stat. § 211B.06.

ORDER

IT IS ORDERED:

1. That there is probable cause to believe that Respondents violated Minnesota Statute § 211B.06 as alleged in the Complaint.

2. That this matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges pursuant to Minnesota Statute § 211B.35.

Dated: November 6, 2006

/s/ Kathleen D. Sheehy

Tape recorded. One tape.

MEMORANDUM

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the complaint.¹ The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.² The purpose of a probable cause determination is to answer the question whether, given the facts disclosed by the record, it is fair and reasonable to require the respondent to go to hearing on the merits.³ If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict of acquittal, a motion to dismiss for lack of probable cause should be denied.⁴ A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. When a defendant offers either testimonial or non-testimonial evidence to controvert the facts appearing in the record, the motion to dismiss must be denied unless the evidence introduced by the defendant makes "inherently incredible" the facts which appear in the record and which are necessary to establish an essential element of the offense charged.⁵

As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the Respondents have committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

This case involves a campaign flyer, critical of the Complainants, that was apparently distributed to some number of residents of Monticello. Respondent Fred Patch, the former building code official for the City of Monticello, currently

¹ Minn. Stat. § 211B.34, subd. 2.

² 239 N.W.2d 892 (Minn. 1976); see also Black's Law Dictionary 1219 (7th ed. 1999) (defining "probable cause" as "[a] reasonable ground to suspect that a person has committed or is committing a crime.")

³ *Id.*, 239 N.W.2d at 902.

⁴ *Id.* at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the test for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

⁵ *State v. Florence*, 239 N.W.2d at 903.

has a wrongful termination lawsuit pending against the City. Patch admits that he prepared a one-page document that is similar but not identical to the flyer at issue.⁶ He testified that he prepared the document in the second week of October at the request of Susie Wojchouski, a candidate for election to an open seat on the City Council, after discussing her plans for campaign mailings. Wojchouski had indicated to Patch that she might do another mailing closer to the election. Some time between October 9 and October 13, 2006, Patch provided Wojchouski with two copies of the document he had prepared. She testified that after reviewing the document, she decided some parts of it were “stupid” and some parts were false, and she concluded that she would not use it to promote her own campaign.

On or about October 15, 2006, Wojchouski had a campaign meeting at her home. At the end of the meeting, when everyone else had left besides Rhonda and Bruce Thielen, she showed the Thielens the document prepared by Patch. She maintains she told them she did not want the document to be distributed, but when Rhonda Thielen asked if she could keep one of the two copies, Wojchouski allowed her to do so. Bruce Thielen is the former mayor of Monticello, who was defeated by Clint Herbst in the last election. Shortly thereafter, Rhonda Thielen wrote a letter to the editor that was published in the *Monticello Times* making reference to some of the allegations in the Patch document and to allegations of impropriety and possible illegality “swirling around” a city council member and the mayor.

The Patch document differs from the flyer attached to the Complaint in that the flyer’s headline is different, two bullet points (nos. 4 and 9) were added, and additional sentences were added to bullet point nos. 7 and 8. Patch and Wojchouski maintain they have no idea who made the changes to the document and distributed it further after it left Wojchouski’s home. Both argue that there is insufficient evidence that they were involved in the ultimate distribution of the document to other residents of Monticello and that the Complaint should accordingly be dismissed.

Minn. Stat. § 211B.06 prohibits a person from intentionally participating in the “preparation, dissemination, or broadcast” of campaign material with respect to the personal or political character or acts of a candidate that is designed or tends to injure or defeat a candidate, and which the person knows is false or communicates to others with reckless disregard of whether it is false (emphasis added). Patch testified that Wojchouski asked him to prepare the document and that he did so, but says he believed everything in it was factually true. He gave it to Wojchouski. She in turn, although believing parts of it to be false, gave it to the Thielens. From there, it apparently was supplemented and received broader distribution. There is sufficient evidence that Patch and Wojchouski intentionally participated in the preparation or distribution of campaign material that contains statements the Complainants maintain are false. The fact that unknown others

⁶ The document Patch admits to preparing is Attachment D to Ex. 5.

may have also participated in supplementing or disseminating this material does not mean that the Complaint should be dismissed as to Patch and Wojchowski.

In the prima facie review, the Administrative Law Judge concluded that some of the statements contained in bullet point nos. 2, 3, 7, 8, and 10 were sufficient to state violations of Minn. Stat. § 211B.06.

Bullet Point No. 2

Bullet Point No. 2 provides:

Election 2004—Your Mayor Herbst accepted substantial political contributions from his township cronies to pay for election expenses—including all his BIG SIGNS. After the election, Posusta, Herbst, Mayer and Perrault provided a little political pay-back by settling a lawsuit, awarding that resident nearly \$100,000! Of course, that same township resident remains a faithful campaign contributor this election, and the sign litter is there to prove it this campaign as well!

The Complainants vigorously dispute that the settlement of a wrongful termination lawsuit filed by Rebecca Young against the City was “political payback.” Young was terminated from her job as a receptionist after using a city copy machine to make 50 copies of a petition for a Monticello Township Citizens Against Annexation meeting. At the time, the City was involved in a bitter annexation dispute with Monticello Township. Then-Mayor Bruce Thielen and three other city council members voted to fire Young, while Glen Posusta voted against it. Posusta and Herbst contend that the City Council did nothing more than approve a settlement negotiated by the League of Minnesota Cities defense attorney, after the evidence showed that other city employees, including the city administrator, had used the copy machines for personal use. Wojchowski agrees that no one on the City Council was happy about settling this litigation for such a large sum of money. In addition, Herbst maintains he received no contributions from Rebecca Young, her husband, or Monticello Township Citizens Against Annexation during this campaign.

The Administrative Law Judge concludes there is probable cause to believe that Bullet Point No. 2 contains a false statement that the agreement to settle the lawsuit was connected to a political contribution to Herbst and that Patch and Wojchowski either knew the statement was false or communicated it to others with reckless disregard for whether it was false.

Bullet Point No. 3

Bullet Point No. 3 provides:

November 30, 2004—According to a written report from the Minnesota State Auditor, your councilman Posusta had a conflict of

interest when he purchased city property along Hwy 25 while he was seated on the City Council. From his council seat, he reduced the purchase price and wrongly benefited in thousands of dollars to buy prime Highway 25 frontage from the City in a closed sale.

The Complainants contend this statement is false. Patch testified that in preparing this bullet point he relied on the letter from the State Auditor's office, which concluded that there was *no* conflict of interest when Posusta executed the original purchase agreement on July 11, 2002, because he was not elected until the following fall and did not take office until January 2003. There was a delay of 15 months in closing the sale, because the City had difficulty obtaining clear title. At the time of the closing, the City Council decided to split the interest owed with Posusta, which resulted in \$2,232 reduction to the purchase price. The State Auditor's office concluded that that this change in the terms after Posusta's election to office "could be viewed" as a conflict of interest and that the auditor could not determine how a court would resolve the issue.⁷

At the probable cause hearing, the Complainants testified that then-mayor Bruce Thielen offered to reduce the price because of the City Administrator's delay in closing the transaction. They allege that at this time, Patch was still employed as the building official and attempted to insert himself into the dispute and that he himself made the complaint to the State Auditor. They further maintain that Posusta abstained from voting on the issue.⁸ Wojchowski attended the meeting and recalls that the City had caused the delay in the closing.

The bullet point in the flyer misstates the critical facts and the auditor's conclusions regarding a conflict of interest. The Administrative Law Judge concludes there is probable cause to conclude that Bullet Point No. 2 contains false statements and that Patch and Wojchowski either knew the statements were false or communicated the statements to others with reckless disregard of whether it was false.

Bullet Point No. 7

Bullet Point No. 7 provides:

Fall 2005—Posusta and Herbst concluded a bullying and retaliatory crusade by creating a new policy that ended in wrongful termination of a city employee, resulting in another dismal lawsuit against the City *to the tune of approximately \$3 million taxpayer dollars. While the city does have insurance for such lawsuits, it is still a taxpayer expense to pay attorneys through the League of Minnesota Cities membership.*

⁷ Ex. 5, Attachment C.

⁸ The minutes of the City Council meeting reflect that Bruce Thielen recommended splitting the interest, and Posusta advocated the position that he should pay less than half of the interest, but that no vote was taken on the matter. See Ex. 2.

This bullet point concerns Fred Patch's own lawsuit against the City. Patch contends that he did not write the italicized portion above, which is the portion that survived *prima facie* review. The Complainants allege that Patch has used the \$3 million figure to describe his damages in the wrongful termination litigation. In addition, the City's attorney in the federal litigation submitted an affidavit stating that the City's attorney's fees are paid by its insurer, the League of Minnesota Cities Insurance Trust, not by the City.⁹ At this stage, the Administrative Law Judge's function is not to resolve conflicts in testimony. There is sufficient evidence to connect the Respondents to the material and there is probable cause to believe the statement violates Minn. Stat. § 211B.06.

Bullet Point No. 8

Bullet Point No. 8 provides:

Winter 2005—At the Lions Club holiday party Herbst and one of his club mates participated in an explicitly sexual performance that was demeaning to women and offensive to nearly all Lions Club members, for which Mayor Herbst later wrote a letter of apology to try to cover up his antics. *At another local meeting, while discussing trees, Mayor Herbst made an inappropriate comment in front of females, referring to his own "woody."*

Patch maintains he did not write the italicized portion above, which again is the only part of this bullet point that survived *prima facie* review. Wojchowski agrees that this is a false statement with regard to Mayor Herbst, because it was a different member of the City Council (not Herbst or Posusta) who reportedly used this terminology in a local meeting. At this point, the evidence is sufficient to find probable cause that this bullet point contains a false statement and that Patch and Wojchowski either knew it was false or communicated it to others with reckless disregard for whether it was false. It is for the panel, not just this ALJ, to make the credibility determination as to Patch's responsibility for writing the statement.

Bullet Point No. 10

Bullet Point No. 10 provides:

September 29, 2006—Posusta accosted and battered a senior high school girl in front of the High School for moving one of his many political signs that are unlawfully located in the public right of way.

Patch testified that he had a good-faith basis for making this statement because his teen-age daughter was one of the three girls involved in moving the sign. He also maintains he was told by Kim Nygren, the girls' cross-country coach, who was present at the time of this incident, that Posusta had grabbed

⁹ Ex. 4, Affidavit of Julie Fleming-Wolfe.

one of the girls by the arm and shook her. Posusta denies that he touched any of the girls, and he further denies that the sign was unlawfully located on the public right of way. He also submitted a sworn statement from Kim Nygren that she was not present during the incident and had no first-hand knowledge of it. He alleges that a teacher who did witness the incident, Kim Emmanuel, stopped and talked to the girls about how dangerous their actions were in running across the street in traffic. There is probable cause to believe that this statement is false and that the Respondents either knew it was false or communicated it to others with reckless disregard of whether it was false.

Having found probable cause with regard to the above statements, this matter will be referred to the Chief Administrative Law Judge for assignment to a panel of three administrative law judges for an evidentiary hearing. A notice of evidentiary hearing will be issued, assigning this matter to a panel of administrative law judges, and setting the date and time for the evidentiary hearing and the exchange of witness and exhibit lists.

K.D.S.